

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE SERVICES

Before the Commissioner of Financial and Insurance Services

In the matter of

XXXXX

Petitioner

File No. 84588-001

v

Blue Cross Blue Shield of Michigan
Respondent

**Issued and entered
this 23rd day of January 2008
by Ken Ross
Acting Commissioner**

ORDER

**I
PROCEDURAL BACKGROUND**

On August 20, 2007, XXXXX, on behalf of her minor son XXXXX (Petitioner), filed a request for external review with the Commissioner of Financial and Insurance Services under the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq.* The Commissioner reviewed the material submitted and accepted the request on August 27, 2007.

The Commissioner assigned the case to an independent review organization (IRO) as required by section 11(6) of PRIRA, MCL 550.1911(6), because it involved medical issues. The IRO provided its analysis and recommendations to the Commissioner on September 10, 2007, and January 9, 2008.

**II
FACTUAL BACKGROUND**

The Petitioner receives health care benefits from Blue Cross Blue Shield of Michigan (BCBSM) through the Michigan Education Special Services Association (MESSA), an underwritten

group. Coverage is governed by the MESSA Super Care 1 – Revised Group Health Care Benefit Certificate (the certificate).

The Petitioner has been diagnosed as autistic. He received applied behavior analysis (ABA) treatment (45 sessions) at XXXXX from June 1 through August 18, XXXX. The cost of this care (at \$60.00 per session) was \$2,700.00.

Payment for the Petitioner's ABA treatment was denied because BCBSM said it was not covered under the certificate. The Petitioner appealed. After a managerial-level conference on May 31, 2007, BCBSM did not change its decision and issued a final adverse determination dated June 20, 2007.

III ISSUE

Did BCBSM properly deny coverage for the Petitioner's ABA treatment?

IV ANALYSIS

Petitioner's Argument

According to the Petitioner's mother, he was in desperate need of therapeutic intervention in 2004 because of numerous serious emotional and behavioral issues and ABA was a tool used to help him resolve those problems.

The Petitioner describes ABA as a science where behaviors are studied extensively and the information learned is then applied to the real world. The Petitioner says hundreds of research studies have been conducted about the value of ABA in the treatment of autism, that it is based on scientific methods, and that it is not investigational or experimental.

The Petitioner's mother believes that emotional and behavioral issues in children who are not autistic would be dealt with using mental health therapy and BCBSM would pay for the care. She asserts that the Petitioner has been singled out as unworthy of therapeutic intervention because

of his autism. She says autism is a special factor that has to be considered when determining what type of therapeutic intervention is to be used and that ABA therapy was appropriate for him.

XXXXX, director of the early childhood program at XXXXX, wrote in support of the Petitioner.

She described the Petitioner's condition:

[The Petitioner's] diagnosis is autism (ICD9 code 299.0). This disorder manifests itself with a severe communications disorder, apraxia, sensory modulation dysfunction, repetitive nonfunctional motor behaviors, and behavioral modification difficulties. He has poor eye contact, impaired developmental play, stereotypes, and difficulties with attention and ability to stay on task.

XXXXX further said that the ABA treatment is "medically necessary and clinically appropriate psychotherapy for [the Petitioner]."

The Petitioner also believes that ABA therapy is a covered benefit under his BCBSM certificate and BCBSM is required to pay for it.

BCBSM's Argument

In BCBSM's June 21, 2007, final adverse determination, BCBSM denied coverage for the Petitioner's treatment because it considered ABA to be investigational and investigational services are excluded from coverage in the certificate. Subsequently, BCBSM dropped the argument that ABA is investigational and only argued that it is not a covered benefit under the certificate.

BCBSM describes autism as one of the "pervasive developmental disorders" and that ABA is a therapy that attempts to "reduce disruptive behaviors and improve communication skills and social adjustment." BCBSM says that behavioral therapy (like ABA) is not one of the covered therapies listed in Section Fifteen of the certificate and therefore it was correct in denying payment for the Petitioner's treatment.

Commissioner's Review

Services that are investigational or experimental are excluded from coverage in the certificate (page 51). However, the Commissioner notes that BCBSM has abandoned its argument in this case that ABA therapy is investigational. In a position paper dated September 6, 2007, and

addressed to the IRO assigned to review this case, BCBSM based its denial solely on the fact that ABA treatment is not one of the therapies that is covered under the MESSA Super Care 1 – Revised Group Health Care Benefit Certificate.¹

Since BCBSM has dropped its argument that ABA therapy is excluded because it is investigational, the Commissioner must then determine if BCBSM correctly denied benefits under other terms or conditions of the certificate. While the Commissioner does not dispute the Petitioner's assertion that the ABA therapy has been of great benefit, not all medically necessary services are covered under the certificate and in Section Twenty the certificate excludes payment for any service that is not covered.

BCBSM says the only therapy services that are covered are found in Section Fifteen of the certificate (pages 36-37). That section says:

The following therapy services are paid as indicated below if obtained in the outpatient department of a hospital, a physician's office or a freestanding facility. Therapies must be medically necessary and ordered by and performed under the supervision or direction of a legally qualified physician except where noted. Benefits include the following:

15.1 Physical Therapy

* * *

15.2 Speech and Language Pathology Services

* * *

15.3 Chemotherapy

* * *

15.4 Radiation Therapy

* * *

15.5 Hemodialysis

* * *

15.6 Outpatient Psychotherapy

* * * Services must be provided by a licensed physician or a fully licensed psychologist or obtained at a BCBSM participating outpatient psychiatric care center. Benefits are limited to a maximum of 50 visits per person per calendar year. * * *

1. In any event, the IRO physician reviewer concluded that ABA treatment "is an accepted and effective treatment for autism" and "is no longer considered to be experimental or investigational" for the treatment of the Petitioner's condition.

15.7 Outpatient Substance Abuse Therapy

* * *

The Commissioner finds that the Petitioner's ABA therapy would not be covered as chemotherapy, radiation therapy, hemodialysis, or outpatient substance abuse therapy since they are clearly not therapies the Petitioner received. The Commissioner further finds that ABA therapy for the treatment of autism is not "physical therapy" or "speech and language pathology services" as those terms are defined and used in the certificate. The remaining question then is whether ABA therapy is "outpatient psychotherapy." That term is not defined or explained in the certificate.

In addition to the question of whether the Petitioner's ABA therapy was investigational, the IRO reviewer was asked if ABA is outpatient psychotherapy. The IRO physician reviewer assigned to evaluate this case is board certified in neurology, holds an academic appointment as a professor of neurology and pediatrics, and has been in practice for more than 25 years. The IRO reviewer concluded:

Applied behavioral analysis involves psychoeducational treatment, and therefore can be classified as "outpatient psychotherapy."

The Commissioner can see no reason to reject the IRO reviewer's conclusion. The Commissioner notes that Dr. Anan also refers to the Petitioner's treatment as "psychotherapeutic" and "psychotherapy" in her correspondence.

The Commissioner therefore finds that the Petitioner's ABA therapy from June 1 through August 18, 2004, is a covered benefit, subject to all the certificate's requirements and limitations regarding outpatient psychotherapy.

V ORDER

BCBSM's June 20, 2007, final adverse determination is reversed. BCBSM shall cover the Petitioner's ABA therapy from June 1 through August 18, 2004, within 60 days from the date of this Order, and shall provide the Commissioner with proof it has complied with this Order within seven days of compliance.

To enforce this Order the Petitioner must report any complaint regarding compliance to the Office of Financial and Insurance Services, Health Plans Division, at (877) 999-6442.

This is a final decision of an administrative agency. Under MCL 550.1915, any person aggrieved by this Order may seek judicial review no later than 60 days from the date of this Order in the circuit court for the county where the covered person resides or the circuit court of Ingham County. A copy of the petition for judicial review should be sent to the Commissioner of the Office of Financial and Insurance Services, Health Plans Division, Post Office Box 30220, Lansing, MI 48909-7720.